BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The judgment of the Kentucky Court of Appeals, a review of which is now sought, was rendered December 20, 1940 (R. 276-293). A petition for rehearing was filed January 14, 1941 (R. 293) and was denied February 14, 1941 (R. 306).

The opinion of the Kentucky Court of Appeals is reported in *Barnes, et al.*, v. *Hall, et al.*, 146 S. W. (2d) 929.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended February 13, 1925 (28 U. S. C. A., 344).

The judgment of the Kentucky Court of Appeals involves principles not heretofore settled by this Court.

The judgment of the Kentucky Court of Appeals establishes a different interpretation for the workmen of Kentucky as distinguished from that applying to the same circumstances in other States.

The settlement of the questions involved is of great importance to the general public as distinguished from that of the parties.

The National Labor Relations Act and the Social Security Act establish the right to collective bargaining and the payment of unemployment benefits.

The decision here sought to be reviewed renders the Kentucky Act repugnant to the Social Security Act and the National Labor Relations Act, in that it denies benefits to one who is collectively bargaining.

The contribution by the employee to the Unemployment Trust Fund entitles him to a protection of his rights and interest therein under the Federal Statutes or by the Fourteenth Amendment to the Constitution of the United States,

and the decision sought to be reviewed deprives petitioners of such rights.

Statement of Facts.

A full statement of facts is set out in the petition.

Questions Presented.

1. The Kentucky Court of Appeals by its judgment has held that the negotiations and collective bargaining in the New York conferences constituted a labor dispute. It is the contention of your petitioners that negotiations and the orderly processes of collective bargaining are the preventatives of labor disputes and of strikes and are the fulfillment of the purposes of Congress in writing into law such acts as the National Labor Relations Act, and if men are to be accused of engaging in labor disputes when they avail themselves of their rights to negotiate and bargain collectively, and if they are to be denied compensation on account of such negotiating and such bargaining, then the Wagner Act is rendered futile, and the good intentions of Congress to prevent burdens on commerce are rendered void and of no effect. It is the contention of the petitioners that a labor dispute or strike does not commence until collective bargaining fails. The facts in this case undeniably show that at no time did the negotiations in New York break off, but continued until an agreement was finally consummated.

2. That the judgment of the Court of Appeals deprives the petitioners of their rights granted under Chapter 7 of the National Labor Relations Act of the United States found in 29 U. S. C. A., section 151, 49th Statutes, 449, in that by depriving the miners of their unemployment compensation during the period of negotiating and bargaining, this judgment has placed a burden upon the enjoyment of rights guaranteed to them under the National Labor Relations Act, and has placed the Kentucky workmen at a disadvan-

tage as compared with the position of workmen north of the Ohio river under the same circumstances.

3. That the judgment of the Kentucky Court of Appeals deprives the petitioners of a property right granted under the Social Security Act, and of participation in the unemployment trust fund, into which the miners pay one per cent of their wages, all in violation of the Fourteenth Amendment to the Constitution of the United States.

4. That the questions involved herein are of great public importance as distinguished from the interest of the parties, and that the ruling of the Kentucky Court, in depriving the Kentucky miners of their rights under the National Labor Relations Act and by placing them at a disadvantage as compared to the miners of other States, has created a background for strife and labor difficulties which will adversely affect public interest in the future.

ARGUMENT.

The Kentucky Interpretation Denies Rights of Collective Bargaining.

The purpose of Congress in granting to labor the rights of collective bargaining, as set out in the National Labor Relations Act, was for the double purpose not only of granting to workmen their rights as American citizens, but to lift or remove or prevent the burdening or obstructing of commerce. This purpose is set out in section 151, Title 29 of the Federal Code Annotated, (49 Stat. 449).

Section 157, Title 29, Federal Code Annotated, (49 Stat. 452) sets out the rights of the employees, and is as follows, to-wit:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choos-

> ing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Chief Justice Hughes in his opinion in the case of *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation,* 301 U. S. 1, page 42; 57 S. Ct. 615, page 626; 81 L. Ed. page 893, said:

> "Experience has abundantly demonstrated that the recognition of the right of the employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife."

If the purpose of Congress, and if the attitude as expressed in the opinions of this Court, is to guarantee to working men their rights to negotiate and to bargain collectively in order that strife might be prevented, then certainly it ought to be the attitude of both the Congress and the Courts to prevent the placing of any burden upon the enjoyment of these rights.

The facts which existed in Pennsylvania, Maryland and Ohio were identically the same set of facts that existed in all of the southern States, including Kentucky. The controversy over which this case arises existed in all of the Appalachian districts, and yet, we find the State of Pennsylvania not questioning the rights of the men to enjoy their unemployment benefits during the shutdown occasioned by the failure to reach an agreement and make a new contract in 1939. We find the State of Maryland granting the miners their compensation at a hearing before the Unemployment Compensation Commission, and in the State of Ohio, when relief was denied by the Commission, the case was appealed to the courts, and by a judgment of the appel-

late court of that State the men were granted their compensation (R. 293). Strangely enough, the decision of Ohio holding that a miner north of the Ohio river was entitled to his compensation during the period of negotiating and bargaining, which brought about the contract of 1939, was handed down on December 20, 1940, or, on the same day that the Court of Appeals of Kentucky declared that a workman south of the Ohio, under identically the same circumstances and under the same law, was not entitled to his benefits. The only difference between the two acts is the fact that the Ohio miner pays nothing to create the trust fund, but the Kentucky miner pays one per cent of his wages to create the trust fund.

The court will bear in mind that all of the unemployment compensation acts of the various States in which this controversy has arisen, and, for that matter, for the entire United States, were sponsored by the Federal government through the Social Security Board and that the model acts were sent to all the States, and in most instances were adopted by the States with very little change from the text of the acts as sent out by the National Social Security Board. Under the provisions of this act the Federal government pays the cost of the administration for all of the various State set-ups. In other words, we have a situation existing in the United States wherein one law passed by the Federal government and administered by an agency of the Federal government grants to a workman the rights to bargain collectively and to negotiate concerning wages, hours and conditions of work, and on the other hand we have another agency of the Federal government furnishing the money to finance a State administrative body which, by and through the use of funds furnished by the Federal government, places a burden upon the enjoyment of the rights sought to be granted and protected by the other Federal agency. The National Labor Relations Board seeks to safe-

guard the men in their rights set out under the Federal law, but in Kentucky the State agency, financed with Federal funds, says to the working man in Kentucky, in effect, "If you avail yourself of the rights held out to you by the National Labor Relations Act, we will take away from you your unemployment compensation," whereas, just north of the river, the courts of Ohio and the administrative agencies in both Maryland and Pennsylvania say to their miners, "Enjoy the rights guaranteed to you by the Federal government through the National Labor Board and Act for it will not interfere with your benefits under the State Unemployment Compensation law." Thus we have the Nation divided against itself in the matter of the interpretation and application of the Social Security set-up, which was meant to give to men the full enjoyment of their rights as American citizens.

There is but one agency that can clear this muddle and to that agency your petitioners are now appealing. If this Court fails to take jurisdiction or to grant relief, this condition must continue as it is, and we shall continue to find the working man of the south denied his compensation even though he contributes a portion of his earnings to finance the trust fund set up to establish the unemployment compensation, and even though in the north his brother workman shares in a trust fund to which he makes no direct contribution out of his wages.

In effect, we see in the decision of the Kentucky Court of Appeals a complete nullification of the benefits intended to be granted by the National law, to-wit: the National Labor Relations Act, for if the Kentucky court can place the burden of a denial of unemployment benefits on a workman who seeks to avail himself of his rights under the National Labor Relations Act, then by other acts of the Kentucky legislature, and by other decisions of the courts,

the Kentucky workman can further be burdened in any attempt which he makes to avail himself of his rights under the National Labor Relations Act.

The miners, by tradition and custom for fifty years, have worked always on a two-year contract. Each contract provides for its own termination and for a period of negotiation, which usually begins in the middle of the month of March preceding the April 1st date on which the contract is to expire. When that contract expires, by tradition and custom in the industry, there is no longer the relationship of employer and employee between the parties. The operator does not attempt to open the mines and the miner does not report for work until a new contract is agreed upon. In this instance, as is usually the case, there was no picketing nor any of the other customary activities attendant upon a labor dispute or strike. By agreement between the parties, maintenance crews took care of the properties of the operators, and the conferees remained at their task in New York until their efforts finally brought forth the May 12th agreement under which the parties have worked for the past two years. Had such negotiations broken down and had collective bargaining failed, then undeniably there would have been a strike, but the fact that these negotiations were successful prevented a strike or labor dispute. The Kentucky court, by its decision, places a cloud on the enjoyment of the Federal rights of the working man of Kentucky as guaranteed under the National Labor Relations Act and denies to the working man the benefits intended by the Social Security structure fostered by the Federal government.

In the case of *Charles Wolff Packing Co.* v. *Court of Industrial Relations of the State of Kansas,* 262 U. S. 522, wherein this Court held the Kansas Act unconstitutional

because it deprived the petitioner therein his liberty of contract without due process of law, this Court said:

> "The employer is bound by this act to pay the wages fixed and, while the worker is not required to work, at the wages fixed, he is forbidden, on the penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him."

and, again, the Court said, in the concluding paragraph of its opinion:

> "We think the Industrial Court Act, insofar as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the 14th Amendment, and deprives it of its property and liberty of contract without due process of law."

The Court of Appeals of Kentucky, by its judgment, deprived petitioners of their liberty to contract in violation of the Fourteenth Amendment to the Constitution of the United States.

The Court, by its interpretation of the Act under consideration, denies to the petitioners benefits thereunder if their lack of unemployment arises at a time they are in the process of bargaining collectively.

The right to contract, therefore, is protected by the Fourteenth Amendment, and it is equally true that the worker is to be protected in his right to act in concert and collectively with his fellow workers. The Kentucky Court of Appeals by its decision in denying compensation to the miners herein says, in effect, "You may bargain collectively and you may debate your cause, but should you fail to reach an agreement before your contract expires, you forfeit all right to the benefits made and provided for under the Kentucky Unemployment Compensation Act."

The Judgment of the Kentucky Court of Appeals Deprives the Petitioners of a Property Right Guaranteed Under the Laws of the United States.

The Social Security Act of the United States and the Kentucky Unemployment Compensation Act and similar acts of other states form a coordinated plan for the levying and collecting of taxes, the creation of an unemployment compensation fund and the payment of benefits thereunder.

In the case of *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495; 57 Sup. Ct. Rep. 868, the Court said:

> "The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation."

The Social Security Act provides for an annual appropriation of Federal funds for the purpose of assisting the various states in the administration of their unemployment compensation. Title III, section 301, 49 Stat. 626. The cost of the administration thereof by the State agency is to be paid out of the funds so appropriated by the Secretary of the Treasury. Title III, section 302, 49 Stat. 626.

Under section 4748g-14, subsection (3) of section (B), Kentucky Statutes, it is provided as follows:

> "(3) A benefit account. All moneys payable to the fund, upon receipt thereof by the Commission, shall be forwarded to the Treasurer, who shall immediately deposit them in the clearing account. * * * After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America

to the credit of the account of this State in the Unemployment Trust Fund, established and maintained pursuant to section 904 of the Social Security Act, as amended, any provisions of the law in this State relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding."

Section (C) thereunder provides as follows:

"(C) Withdrawals. Moneys shall be relinquished from the State account in the Unemployment Trust Fund solely for the payment of benefits * * *"

Under section 4748g-7, subsection (d) and paragraph (1) thereunder of the Act, it is provided as follows:

"(d) Contribution by workers.

(1) Each worker shall contribute to the pooled account one (1) per centum of his wages paid by a subject employer with respect to his covered employment which occurs after December 31, 1937, * * *."

It will not be questioned that the petitioner, Carl Hall, and all of the other coal miners who seek compensation, contributed out of their wages the amount provided for under the Act to this trust fund, of which the United States Government is the trustee. It is from this trust fund made and provided for by the laws of the United States and of the State of Kentucky that the petitioners seek their unemployment compensation.

The judgment of the Court of Appeals of Kentucky denies the petitioners their right to benefits thereunder.

There is a Public Interest Involved, Separate and Apart From That of the Parties Directly Involved.

The questions involved in the consideration of this case are not limited to the interest of the parties directly in-

volved, but the general public has an interest separate and apart from the interest of the parties to this action.

When the process of collective bargaining breaks down and strikes and labor disputes begin, the general public is a party to the suffering, though it is not a party to the negotiations or to the bargaining. It was the avowed purpose of the National Labor Relations Act to prevent the burdening of commerce that served as the public policy paragraph of the National Labor Relations Act. In other words, it was to prevent unnecessary burdens on commerce that Congress enacted this law. If then, the State court, through its interpretation, deprives men of the right to collective bargaining and thereby nullifies this Act, which had as its aim the prevention of strife and the promotion of industrial peace, then such a controversy is fraught with a public interest, separate and apart from its influence and effect upon the parties involved. It has long been the precedent of this Court that whenever an action or a controversy carries with it questions of vital importance to public interest, that this Court will take jurisdiction. This principle of law was established in the case of *Layne and Bowler Corporation* v. *Western Works,* 261 U. S. 387, 67 L. Ed. 712, in which the Court said:

> "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, * * *"

and, again in the case of *Thornhill* v. *State of Alabama,* 310 U. S. 87, 84 L. Ed. 1093, the Court said:

> "The case is here on certiorari granted because of the importance of the questions presented."

We have in the consideration of this case the problem of a conflict in the interpretation of a Federally sponsored,

State administered set-up, wherein the States to the south of the Ohio river, under the same set of circumstances and on the same facts, growing out of the same negotiations, have decided that workmen shall be deprived of their compensation, when to the north of the river, workmen under the same circumstances are granted their compensation.

The interest of the public is especially apparent at the time of the writing of this brief, for today the negotiations are again in progress, and again the miners seek to bargain with their employer, and again they offer to continue work pending negotiations, and again the operators refuse to agree to the continuation of work pending negotiations. The effect of the decisions of the southern courts, depriving their miners of unemployment benefits, is especially apparent at this time through its effects on the New York negotiations. Bearing in mind that the principal coal producing States in the north two years ago granted their miners unemployment benefits during the shut-down pending negotiations, and that the southern States denied benefits to their miners, it is significant that during the New York negotiations from the very outset it was apparent that the miners and operators of the north would have no trouble reaching an agreement, but that the operators of the south would deadlock the conferences rather than grant such wage increases as increased profits and increased cost of living would justify.

Your petitioners contend that it is doubly significant, because the southern operators were armed with a weapon to be used against their employees which the northern operators did not possess. In other words, the southern operators had the advantage of knowing that their miners would receive no unemployment benefits pending negotiations for a new contract and that, therefore, this economic weapon could be used against the miners to force them to contract for a lower wage, whereas in the North the oper-

ators, who had without protest granted to their employees, the rights to their unemployment benefits, as was the case in Pennsylvania, Ohio, and Maryland, such northern operators had no such economic weapon as the southern operators possessed to fight wage increases, and, consequently, so far as the public is concerned, the situation is this: because of the refusal of the southern operators to continue negotiations, we are faced with a coal shortage which would probably never have existed except for the fact that the southern coal operators left the New York conferences and refused to further negotiate and it was not until the President of the United States called upon these operators to return to the conferences that they consented to do so.

The situation as between the two sections presents a state of facts, where, pending negotiations, the miners in the North draw their compensation for sixteen weeks, and the operators knowing that they have this economic advantage are willing to begin negotiations immediately and to try to reach an agreement during the time stipulated in the contract between the parties for such negotiations. On the other hand, in the South, the operators knowing that, immediately, their employees will be deprived of their unemployment compensation and that they cannot economically hold out very long in any controversy over wages, the operators of the south at first offer no wage increase, then offer 60 cents a day as compared with the northern offer of $1.00 a day increase, and then they leave the conferences avowing never to return rather than agree to the same wage increase which the northern coal operators had offered.

In this conflict in interpretation of the coordinated social security set-ups of the various States, the public certainly has an interest separate and apart from the parties directly involved. In our social security program the Nation should not be divided. The working men south of the Ohio river should have the same rights under the social security

program as the working men north of the Ohio. They should have the same guarantee of their rights under the National Labor Relations Act regardless of what part of the United States they happen to reside in, but only the decision of this Court can remove the burden which the southern governments have placed through their statutes and courts upon the working men of the south.

It is reasonable to assume that in the present conferences now in progress in New York that had the southern operators not been able during the past two years to have secured for themselves the economic weapon of denial of unemployment benefits to their workmen, that they too would have been willing to continue the New York negotiations until an agreement was reached. In the interest of the general public, whose only concern in this controversy is the elimination of strife and the steady flow of commerce between the different States, this Court should eliminate any burdens which, by State statutes or State judicial interpretation, denies to the public the protection intended by the Federal laws such as the National Labor Relations Act and other acts to prevent industrial strife.

The picture of the southern coal miners being denied their unemployment compensation each two years during the period of negotiations for a new contract, while the coal miners of the north draw their unemployment compensation under the same social security set-up, originally sponsored by the Federal government, is certainly not conducive to industrial contentment. The workman in the south can see no reason why he should not have the same rights accorded to the workman in the north under the laws of the United States.

There is no agency of our government which can grant him this right except the Court to which your petitioners have now brought their cause. Equal privilege is axiomatic among all American people, and even among those who

have been denied equal protection there yet remains a deep seated conviction and a sense of having been thwarted in the attainment of their rights that is not conducive to good American citizenship. The situation which now exists in this particular as between the northern and southern miners cannot be defended by logic, nor by any sense of justice. The same law should apply to both the north and the south, and the same benefits should be available under the same set of circumstances and under the same laws to the workmen of both the north and the south. This Court has the power to right the wrong which now exists.

The Questions Here Presented Were Presented to the State Court.

The Federal questions herein presented could not have been anticipated. We certainly had no right to assume that the Court of Appeals of Kentucky would give a definition of labor dispute which would include collective bargaining. We had no right to conclude that the Kentucky court would define the orderly processes of negotiations and of collective bargaining as falling within the definition of strike or labor dispute.

The Federal questions herein set forth were incorporated in the petition for a rehearing to the Court of Appeals of Kentucky. These questions were presented at the very first opportunity to the Kentucky Court. The Circuit Court of Kentucky ruled that collective bargaining and negotiations, as provided for under the National Labor Relations Act, did not constitute a strike and, therefore, your petitioners had no way of knowing that the Court of Appeals would reverse this ruling and would define collective bargaining as constituting a labor dispute or strike.

In the case of *State of Missouri, etc.*, v. *Gehner, etc.*, 50 Sup. Ct. Rep. 326, 281 U. S. 313, writ of certiorari was

granted where a Federal question was first raised in the petition for rehearing on the ground that petitioner had no reason to anticipate the ruling.

The Circuit Court of Kentucky allowed the miners their unemployment compensation. The State Unemployment Compensation Commission appealed this ruling to the Court of Appeals. There was nothing for the petitioners in this instance to object to, because the ruling was in favor of the petitioners. There was no cause to raise Federal questions for the Court had decided in petitioners' favor. There was no occasion or reason to anticipate that any court would give an interpretation to the Kentucky Unemployment Compensation Act which would, in effect, deprive the workmen of Kentucky of their rights to bargain as guaranteed under the National Labor Relations Act or of their rights to participate in the Federal trust fund, which the payment of one per cent of their wages had entitled them to.

In order that Kentucky workmen may share in our National Social Security program, and in order that they may be protected in their rights to bargain collectively as is guaranteed by Federal law, we respectfully request the issuance of this writ of certiorari.

Respectfully submitted,

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